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No. 95-974

In the Supreme Court of the United States

OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,
PETITIONER,

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS ARIZONANS AGAINST CONSTITUTIONAL TAMPERING AND THOMAS ESPINOSA

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QUESTION PRESENTED

1. Does a state law forbidding state elected officials from communicating with their colleagues and constituents in languages other than English "during the performance of government busines" violate the free speech clause of the first amendment?

RULE 29.1 STATEMENT

Arizonans Against Constitutional Tampering is a private unincorporated association with no parent or subsidiaries.

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BRIEF IN OPPOSITION OF RESPONDENTS ARIZONANS AGAINST CONSTITUTIONAL TAMPERING AND THOMAS ESPINOSA

This brief is submitted by Respondents Arizonans Against Constitutional Tampering and its Chairperson Thomas Espinosa in opposition to the Petition for Writ of Certiorari filed with this Court by Arizonans for Official English and its Chairperson Robert D. Park. Respondent Maria-Kelly F. Yniguez is submitting a separate brief in opposition to the petition.

REASONS FOR DENYING THE PETITION

I. SUMMARY OF ARGUMENT

Article 28 of the Arizona Constitution provides that "English is the language of the ballot, the public schools and all governmental functions and actions." Ariz. Const., Art. 28, §1(2). Article 28 applies to "the legislative, executive and judicial branches of government," and to "all political subdivisions, departments, agencies, organizations, instrumentalities, local governments and municipalities" of the State, including "all government officials and employees during the performance of government business." *Id.*, §1(3)(a)(iv). Article 28 requires that "[t]his State and all political subdivisions of this State shall act in English and in no other language," and "prohibit[s] this State from using or requiring the use of languages other than English. . . ." *Id.*, §3(1)(a). Based on this uniformly inclusive and specific language, Article 28 is "by far the most restrictively worded official-English law to date." M. Arrington, Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J. L. & Pol., 325, 327 (1991).[1]

After the Governor of Arizona announced her intention to enforce Article 28, a state employee (Maria-Kelly F. Yniquez), a state elected official (Jaime Gutierrez), and a local political action committee (Arizonans Against Constitutional Tampering) consisting of multilingual state elected officials, state employees and citizens of Arizona challenged Article 28 in federal court seeking a declaration that Article 28 violated their rights under the free speech clause of the first amendment and the equal protection clause of the fourteenth amendment. The district court, a three judge panel of the Ninth Circuit, and the

[1] *See also* D. Baron, *The English-Only Question*, 21 ("[A]rticle 28 . . . is the most restrictive of the current wave of official-language laws. . . .") (1990), and J. Crawford, *Hold Your Tongue*, 176 (1992) ("Arizona's [Article 28 is] so far the most restrictive [Official English] measure"). The decision below also compared Article 28 with other Official English laws and acknowledged Article 28's unique breadth. *See* Petitioners' Appendix, 12a (" 'official-English' provisions [outside of Arizona] appear to be primarily symbolic").

Ninth Circuit sitting *en banc* successively declared Article 28 facially invalid on free speech grounds. The Governor of Arizona elected not to appeal from the district court's final judgment after a trial on the merits, and petitioners intervened in order to prosecute an appeal.

Because Article 28 expressly forbids state elected officials and their agents from communicating with their colleagues and constituents in languages other than English "during the performance of government business," the lower courts all concluded that Article 28 abridged "core" political speech in violation of the free speech guarantee of the first amendment. *See New York Times* v. *Sullivan*, 376 U.S. 254, 273 (1963) (the protection of communications between elected officials and members of the public is "central" to the meaning of the first amendment). Accordingly, after a trial on the merits and almost eight years of litigation, three separate adjudicative bodies have considered and rejected petitioners' claims.

It is difficult to recall any recent enactment that rivals Article 28 in its facial unconstitutionality. (The ordinance facially invalidated by this Court on free speech grounds in *R.A.V.* v. *City of St. Paul*, ___U.S. ___, 112 S.Ct. 2538 (1992), is a possible contender.) By declaring that English and "no other language" is "the language of the ballot," Article 28 facially violates the Voting Rights Act of 1965, 42 U.S.C. §1973(4)(f)(1) and (2), as illustrated by this Court's opinion in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). By declaring that English and "no other language" is "the language of the public schools," Article 28 facially violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000(d), as illustrated by this Court's opinion in *Lau* v. *Nichols*, 414 U.S. 563 (1974). Lastly, by proclaiming that English and "no other language" is "the language of all government functions and actions" by state elected officials "during the performance of government business," Article 28 facially violates the first amendment, as illustrated by this Court's unanimous opinion in *Bond* v. *Floyd*, 385 U.S. 116 (1966), uniformly relied on by the courts below in voiding Article 28 on

free speech grounds (but completely ignored by petitioners). *See* Petitioners' Appendix, 26a, 63a and 106a.

In accordance with *Bond* v. *Floyd*, as Judge Brunetti succinctly observed in his concurring opinion in the *en banc* proceeding below,

> Article [28] offends the First Amendment not merely because it attempts to regulate ordinary speech, but because it attempts to manipulate the political process by regulating the speech of elected officials. Freedom of speech is the foundation of our democratic process, and the language restrictions of Article [28] stifle informative inquiry and advocacy by elected officials. By restricting the free communication of ideas between elected officials and the people they serve, Article [28] threatens the very survival of our democratic society.
>
> . . . . .
>
> "The manifest function of the First Amendment in a representative government requires that legislators be given the *widest* latitude to express their views on issues of policy." [Quoting *Bond* v. *Floyd*, 385 U.S.116, 135-36 (1966) (emphasis added).] Elected representatives cannot fully serve their constituents if they are precluded from fully expressing their views to, and learning the views of, those constituents. The First Amendment precludes an electoral majority from restricting political communications [of elected representatives] with a certain segment of the electorate.

Petitioners' Appendix, 63a-64a. This reasoning reflects this Court's settled understanding of "the central meaning of the First Amendment." *New York Times* v. *Sullivan*, 376 U.S. 254 (1963). As the Court recognized in the *Sullivan* case, the first amendment was designed to "secure the widest possible dissemination of information from diverse and antagonistic sources." *Id.* at 266. As the courts below concluded, Article 28

would restrict and homogenize the dissemination of information by restricting the political speech of state elected officials and their constituents in direct violation of this Court's opinion in *Bond* v. *Floyd*.

For these reasons, the decisions of the courts below were correct and need not divert this Court's precious resources by further review.

II. ARGUMENT

A. The decision below does not rest on the resolution of the questions presented by the petition, and the questions presented by the petition are based on facts that are outside of the record.

In the "Questions Presented" section of their petition, petitioners state that this case involves "a state employee [who] sought to write government documents in Spanish" and a subsequent declaration that Article 28 is "unconstitutional because it violate[s] the free speech rights of public employees." These issues are not central to the decisions below and are in fact based on factual assumptions outside of the record on appeal.

This is not a case of an errant state employee insisting on communicating in a language not understood by her supervisors, co-workers, or members of the public. As acknowledged by the courts below, Ms. Yniquez spoke Spanish only to members of the public and co-workers who understood and desired to speak in Spanish. *See* Petitioners' Appendix, 46a-47a. Many members of the public to whom Mr. Yniquez spoke Spanish could not understand English. On those few occasions when Ms. Yniquez drafted a document in Spanish, it was always for the benefit of a member of the public who could not understand English, and the document was always reproduced in English. Not only was Ms. Yniquez's use of Spanish in the workplace not disruptive, it enhanced her ability to efficiently perform her official duties. Ms. Yniquez's supervisor accordingly did not object to her use of Spanish, and the State of Arizona admitted that it had no legitimate business purpose in proscribing such speech.

In short, this record simply does not provide the facts required to consider the questions presented by the petition.

Even if this Court were free to assume the requisite facts, the decisions below are not contingent on the resolution the questions presented by the petition and rest on independent grounds. Petitioners' description of this case as involving only the free speech rights of public employees is false. In actuality, the district court, the three judge panel of the Ninth Circuit, and the Ninth Circuit sitting *en banc* all concluded that the fact that Article 28 expressly proscribed the political speech of state elected officials and their agents was enough to declare Article 28 unconstitutional on free speech grounds in accordance with this Court's opinion in *Bond* v. *Floyd.* Petitioners' Appendix, 26a, 36a and 106a. Petitioners' avoidance techniques in this regard are best illustrated by their complete failure to address *Bond* v. *Floyd* in their lengthy petition.

Petitioners' procrustean treatment of the record and the decisions below demonstrates that this case is not an appropriate vehicle for addressing the questions presented by the petition.

B. The decision below does not announce any new first amendment protections and is consistent with the opinions of this Court.

The public and private use of languages other than English has been a staple of every era of American history. The United States has been a polylingual nation since its founding, and foreign language communications have constituted "speech" under the first amendment since the Bill of Rights was ratified in December, 1791. As this Court observed over one hundred years ago in *Hurtado* v. *California,* 110 U.S. 516, 530–531 (1884):

> The Constitution of the United States . . . was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of *many tongues.*

(Emphasis added.) The decisions below do not introduce new legal doctrines, but merely acknowledge long-standing rights

that no state has attempted to abridge since the anti-foreign hysteria of the World War I era, culminating in this Court's opinions in *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), *Bartels* v. *Iowa,* 262 U.S. 404 (1923), *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 262 U.S. 404, 410 (1923), *Yu Cong Eng* v. *Trinidad,* 271 U.S. 500 (1926), and *Farrington* v. *Tokushige,* 273 U.S. 284 (1927). In fact, as these (and other) opinions illustrate, Americans have enjoyed a virtually unqualified right to communicate in languages other than English under the first amendment for over two hundred years, and foreign language speech has played an essential role in the development of first amendment jurisprudence.[2]

The polylingualism of the founding era is well–known and has received considerable scholarly attention. Over five hundred Native American languages were spoken in eighteenth century America, and over a quarter of a million German and French speakers had settled in America by 1790. *See* E. Sagarin & R. Kelly, "Polylingualism in the United States of America," in W. Beer & J. Jacob, *Language Policy and National Unity,* 20-43 (1985), and H. Kloss, *The American Bilingual Tradition,* 11-12 (1977). A significant number of African-Americans also spoke various African dialects in early America. *See* J. Blassingame, *The Slave Community,* 25 (1979). As the Pulitzer Prize winning historian Bernard Bailyn has written, "[a]n estimated 10 percent of the pre-Revolutionary population was German-speaking, . . . [and Georgia's] population was so polyglot that a successful magistrate needed to speak fluently in at least three languages and preferably four. . . ." B. Bailyn, *The Peopling of British North America,* 16-17 (1986).

Eighteenth century American polylingualism was not confined to the spoken word or the private sector. In the public

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[2] As this Court observed in *New York Times* v. *Sullivan,* 374 U.S. at 273, the controversy over the Alien and Sedition Acts of 1798 "first crystallized a national awareness of the central meaning of the First Amendment." Hostility to foreign people, foreign ideas and foreign languages gave rise to the enactment of the Acts. *See generally* J. Smith *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties,* 56-58 (1956).

sphere at the national level, the Continental Congress published various official documents in German and French, including the Articles of Confederation and the famous 1774 Address to the people of Quebec extolling the virtues of free speech and self-government. *See* J. Perea, "Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English," 77 Minn.L.Rev. 269, 271 (1992). Official polylingualism was also common at the local level. In eighteenth century Pennsylvania, for example, "[i]n legal action[s] and court proceedings . . ., documents in German were just as valid as those in English." W. Parsons, Representation of Ethnicity Among Colonial Pennsylvania Germans, in *A Mixed Race, Ethnicity in Early America,* 120 (F. Shuffelton, Ed. 1993). Significantly, Pennsylvania was the only state whose constitution had a "free speech" clause when the Bill of Rights was drafted in 1791, and the free speech clause of the first amendment was modeled on the Pennsylvania provision. *See* L. Levy, *Emergence of a Free Press*, 5 (1985).

In the private sector, approximately thirty-eight different German-language newspapers were published in America between 1732 and 1800. *See* K. Conzen, "Germans," *Harvard Encyclopedia of American Ethnic Groups,* 409 (1980). In fact, Benjamin Franklin published one of the first German language newspapers in America in 1732 (the *"Philadelphische Zeitung"*), *see* K. Bartel, "German and the Germans at the Time of the American Revolution, 60 *Modern Language Journal,* 98 (1976), and John Peter Zenger was a "poorly educated German immigrant" who probably spoke more German than English. *See* L. Levy, *Emergence of a Free Press,* 39 (1985).

And of course, the contributions of French, German, African and Native American forces to American Revolutionary War effort were essential to the birth of our Nation.[3]

Based on the express and unqualified language of the free speech clause itself, coupled with the pervasive official and

[3] The official use of Navajo as a military secret-code also helped to preserve the Nation in World War II.

private use of foreign language speech in late eighteenth century America, it is improbable that the framers and ratifiers of the first amendment did not intend to include foreign language speech within the free speech and press provisions of the first amendment. As a leading scholar in the history of American multilingualism has noted, "early political leaders recognized the close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction on these freedoms." S. Heath, Language and Politics in the United States, in *Linguistics and Anthropology,* 267, 270 (1977).

This conclusion is poignantly illustrated by the fact that one of the most definitive official expressions of the original understanding of the freedom of the press is contained in a 1774 proclamation *in French* issued by the Continental Congress to the people of Quebec in an attempt to procure *Quebecois* support for the American Revolution. *See* D. Anderson, The Origins of the Press Clause, 30 UCLA 455, 463-464 (1983). The English language version of the Address states:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and the arts in general, in its diffusion of liberal sentiments on the administration of Government, in its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs.

1 *Journal of the Continental Congress,* 108 (1774). The fact that the first American government engaged in official communications in languages other than English regarding matters of public concern indicates that they considered such communications as falling within the realm of free speech. The framers' acceptance of polylingualism is also reflected in the national motto which they adopted for the Nation—"*E pluribus unum.*"

The free speech tradition of the original framers was respected by the framers of the Civil War amendments. For instance, Representative Thaddeus Stevens of Pennsylvania, the head of the House delegation to the Joint Committee on Reconstruction that officially reported the fourteenth amendment, explained that the Reconstruction legislation passed pursuant to section two of the thirteenth amendment was designed to assure that "all laws be impartial, *without regard to language,* race or former condition." Quoted in D. Donald, *The Politics of Reconstruction, 1863-1867,* 58 (1965) (emphasis added). This understanding reflects the pervasive nature of foreign language speech in the Civil War and Reconstruction eras. In fact, in his unsuccessful 1858 senatorial campaign against Stephen Douglas, Abraham Lincoln had his famous "House Divided" speech (among others) translated into German in order to appeal to Illinois's influential German constituency. *See* D. Donald, *Lincoln,* 211, 231 (1995). The polylingualism of this foundational era of American constitutional history is also illustrated by the publication of Minnesota's constitution of 1857 in English, German, Swedish, Norwegian and French. See J. Crawford, *Hold Your Tongue,* 44 (1992).

The framers' decision not to distinguish between English and non-English speech for first amendment purposes is also reflected by the majority and dissenting opinions in the case that many scholars identify as the starting point of modern first amendment jurisprudence, *Abrams* v. *United States,* 250 U.S. 616 (1920). In *Abrams,* several Russian Jewish emigres challenged their convictions under the Espionage Act of 1917 as violative of their rights under the first amendment based on the fact that the only evidence of "espionage" consisted of distributing leaflets in English and Yiddish condemning America's involvement in the Russian Revolution. Although the Court directly considered (and translated) the Yiddish leaflet in *Abrams,* both the majority opinion by Justice Clarke and the

dissenting opinion by Justice Holmes treat the two languages as standing on equal footing for first amendment purposes.[4]

This Court has also expressly concluded that choice of language is protected by the first amendment. In *Cohen* v. *California,* 403 U.S. 15, 24 (1971), this Court considered whether a person could be punished for wearing a shirt bearing the words "fuck the draft" in the Los Angeles County Courthouse. In concluding that choice of words was protected by the free speech clause, the Court reasoned that:

> We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expressing of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

Id. Although Mr. Cohen could have easily chosen to use less provocative terms, the Court acknowledged that the first amendment protected the "emotional impact" of words in addition to their "cognitive content." *Id.*[5]

As the Ninth Circuit understandably concluded, if a speaker has a free speech right to use profanity under *Cohen,* a speaker

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[4] The Court also considered foreign language speech in the free speech context in *Frohwerk* v. *United States,* 249 U.S. 616 (1919), and *Schaefer* v. *United States,* 251 U.S. 466 (1922), both of which involved the question of whether speech published in German-language newspapers (the *"Missouri Staats Zeitung"*, the *"Philadelphia Tageblatt"* and the *"Philadelphia Sonntagsblatt"*) violated the Espionage Act of 1918. Like the Court in *Abrams,* although the Court carefully translated the speech in question from German to English in each case, it did not state or suggest that such speech did not constitute speech under the first amendment.

[5] This Court has also protected choice of language under the first amendment in the following cases involving profanity: *Gooding* v. *Wilson,* 405 U.S. 518 (1972), *Rosenfeld* v. *New Jersey,* 408 U.S. 901 (1972), *Lewis* v. *New Orleans,* 408 U.S. 913 (1972), and *Brown* v. *Oklahoma,* 408 U.S. 914 (1972).

a fortiori has a free speech right to use a language other than English (especially in those circumstances in which the speaker is unable communicate in English). *See* Petitioners' Appendix, 29a-30a. Correspondingly, as the Ninth Circuit also concluded, if a private citizen's right to engage in foreign language communications cannot be restricted consistent with the first amendment, neither can a state elected official's. *See Bond* v. *Floyd,* 385 U.S. 116, 132-33 (1966) (state may not impose stricter First Amendment standards on legislators; elected officials must "be given the widest latitude to express their views on policy").

Article 28's facial unconstitutionality is perhaps most aptly illustrated by this Court's opinion in *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 262 U.S. 404, 410 (1923), which was consolidated with this Court's decision in *Bartels* v. *Iowa,* 262 U.S. 404 (1923). In *McKelvie,* this Court considered an action to enjoin the Governor and Attorney General of Nebraska from enforcing a 1921 Nebraska statute which provided that:

> The English language is hereby declared to be the official language of this State, and all official proceedings, records and publications to be in such language and all the common school branches shall be taught in said language in public, private, denominational and parochial schools.

Id. at 411, n.3. This statute repealed the statute previously voided by the Court in *Meyer* v. *Nebraska. Id.* The statute is remarkably similar to Article 28 and was voided in its *entirety* by the Court based on its reasoning in *Meyer.*[6]

This Court's longstanding refusal to distinguish between different languages for first amendment purposes is also in accord with the protection of "symbolic" speech under the free

[6] Although *Meyer, Bartels* and *McKelvie* were decided on substantive due process grounds before the development of modern free speech jurisprudence, this Court subsequently characterized *Meyer* as a first amendment case in *Griswold* v. *Connecticut,* 381 U.S. 475, 482 (1965). Moreover, Justice Brandeis, who joined the majority opinion in *Meyer* without separate comment, later indicated that he based his decision on the "right to . . . utter speech." *See* M. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 Sup. Ct. Rev. 299, 320.

speech clause. In fact, in the first case in which this Court voided a law on free speech grounds, the "speech" consisted of the mere display of a red flag without any attendant verbal communications. *See Stromberg* v. *California,* 283 U.S. 359 (1931). Indeed, the fact that foreign language use involves "pure speech" (i.e., only words with no conduct) mandates that it be subject to even greater protection than that enjoyed by "symbolic" speech (i.e., speech plus conduct).

Lastly, but perhaps most importantly, by proscribing an entire category of core political speech by state elected officials, be it in Spanish, American Sign Language, Braille or any other non-English language , Article 28 undermines the fundamental purpose of the first amendment—to guarantee "the free communication of ideas between elected officials and the people they serve. . . ." Petitioners' Apendix, 63a (Brunetti, J., concurring, citing *Bond* v. *Floyd,* 385 U.S. 116, 136-37 (1966)). Article 28 thus stands in conspicuous opposition to this Court's foundational first amendment jurisprudence.

In sum, the decisions below do not announce new constitutional rights. To the contrary, petitioners' clearly seek reversal of *Meyer* v. *Nebraska, Nebraska District of Evangelical Lutheran Synod* v. *McKelvie, Bond* v. *Floyd, Pickering* v. *Board of Education,* and *Cohen* v. *California* and completely ignore the principle of *stare decisis.*

C. The decision below does not conflict with the law of other Circuits.

The decision below is based on an unusual state law and peculiar facts. It does not conflict with the law of any other Circuit. Because this is an action involving the free speech rights of elected officials and other public servants, the cases cited by the petition involving private employers arising under Title VII of the Civil Rights Act of 1964 are inapposite. Nor

does this case implicate any right to multilingual government services. Respondents requested relief only from a prior restraint of free speech.

Based on the absence of conflicting opinions on these issues in the lower courts, this case is inappropriate for certiorari.

D. The decision below is consistent with federalism.

Petitioners argue that this Court should reverse the decision below because it "hinders federalism." Petition, 21. However, the two highest ranking elected officials of the State of Arizona—the Governor and the Attorney General—have both elected not to appeal from the lower courts' decisions or otherwise participate in this proceeding (even if only to urge that Article 28 be submitted to the Arizona Supreme Court for interpretation). They are the individuals that the people of Arizona selected to defend the interests of the State before this Court, not petitioners. Given the fact that the highest elected officers of the State of Arizona have acquiesced in the lower courts' decisions, the interests of federalism require that this Court not intervene in this case to upset a six year status quo. In fact, the only threat to federalism in this case is petitioners' invitation for this Court to rewrite Article 28.

E. This case does not involve circumstances worthy of certiorari.

The outcome of this case was contingent on a uniquely restrictive state enactment which the State itself has elected not to defend. Although this case is important to the parties to this proceeding, the decisions below do not establish rules of general applicability or importance to the legal system of the Nation as a whole. They instead reflect eight years of painstaking efforts by the lower courts to apply well–settled first amendment principles to an exceptionally peculiar and complex factual context impacting a single locality. Reflecting the unusual nature of both the language of Article 28 and the underlying material facts, no inconsistency with precedent has been shown. Given the fact that twenty other states have enacted laws declaring English as their official language, if this issue is

really as worthy of certiorari as the petition claims, other circuits will surely consider the issue in the future and provide this Court with a complete record by which to consider the question. The absence of any litigation on this issue arising outside of Arizona when such laws have been on the books for years demonstrates the unique nature of Article 28 and its purely local impact. The petition merely seeks reversal of a narrowly tailored decision adverse only to petitioners and is thus inappropriate for certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition For a Writ of Certiorari in this matter.

Respectfully submitted,

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